No. 98-10

In The

Supreme Court of the United States

October Term, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,

Respondents.

On Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court had subject matter jurisdiction over this action in light of the Tax Injunction Act.

2. Whether a county privilege/occupational tax levied upon the pay or compensation of an Article III judge violates the Supremacy Clause.

PARTIES TO THE PROCEEDINGS BELOW AND CERTIFICATE OF INTERESTED PERSONS

Petitioner	Jefferson County, Alabama
Petitioner's Counsel	Edwin A. Strickland Jeffrey M. Sewell
Respondents	William Acker U.W. Clemon
Respondents' Counsel	Irwin Stolz Seaton Purdhom Alan B. Morrison
Trial Judge	Honorable Charles A. Moye, Jr., Senior United States District Judge
En Banc Eleventh Circuit Court of Appeals	Hon. Gerald Bard Tjoflat Hon. Phyllis A. Kravitch Hon. Joseph W. Hatchett Hon. R. Lanier Anderson, III Hon. J.L. Edmondson Hon. Emmett R. Cox Hon. Stanley F. Birch, Jr. Hon. Joel F. Dubina Hon. Susan H. Black Hon. Ed Carnes Hon. Rosemary Barkett Hon. Albert J. Henderson

No other persons are known to have participated directly or indirectly in the appeal of this matter.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW AND CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS OF THE OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW	1
STATEMENT FOR BASIS OF JURISDICTION	1
STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
CONCLUSION	39

TABLE OF AUTHORITIES

Page

CASES

Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed.2d 3 (1941) 24

Arkansas v. Farm Credit Services, 520 U.S. 821 (1997) ..... *passim*

Bedingfield v. Jefferson County, 527 So.2d 1270 (Ala. 1988) 14

California v. Grace Brethren Church, 457 U.S. 393 (1982) 12, 13, 19

City of Burbank v. State of Nevada, 658 F.2d 708 (9th Cir. 1981) 13

Collector v. Day, 78 U.S. (11 Wall.) 113 (1870) 22, 28

Concerned Citizens of Fairfield v. City of Fairfield, 718 So.2d 1140 (Ala. Civ. App. 1998) 15

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 27, 28, 29, 33, 39

Department of Employment v. United States, 385 U.S. 355 (1966) 11, 15

Dobbins v. Commissioners, 41 U.S. (16 Pet.) 435 (1842) 22, 28

Federal Reserve Bank v. Commissioner of Corps and Taxation, 499 F.2d 60 (1st Cir. 1974) 16

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 22, 24, 25, 27, 39

Hardwick v. Cuomo, 891 F.2d 1097 (3rd Cir. 1989) 13

Helvering v. Gerhardt, 304 U.S. 405 (1938) 22

TABLE OF AUTHORITIES – Continued

Page

Howard v. Commissioners of Sinking Fund of City of Louisville, 344 U.S. 624 (1953) 24, 37

Howell Lumber Company v. City of Tuscaloosa, 1997 WL 139499 (Ala. Civ. App.) 15

Humble Oil and Refining Company v. Calvert, 478 S.W.2d 926, *cert. denied*, 93 S.Ct. 293, 409 U.S. 967, 34 L.Ed.2d 234 (1972) 30

James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed.2d 155 (1937) 24

Keleher v. New England Telephone and Telegraph Company, 947 F.2d 547 (2nd Cir. 1991) 13

McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819) 21, 22, 23

Melof v. James, 1998 WL 227965 (Ala. Civ. App. May 8, 1998) 15

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 16

Richards v. Jefferson County, 983 F.2d 237 (11th Cir. 1992) 14

Rosewell v. Lasalle National Bank, 450 U.S. 503 (1980) 14

Sizemore v. Rinehart, 611 So.2d 1064 (Ala. Civ. App. 1992) 14

Thompson v. Chilton County, 236 Ala. 142, 181 So. 701 (1938) 14

United States v. County of Fresno, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977) 24

United States v. New Mexico, 455 U.S. 720 (1982) 24, 26, 27, 39

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Alabama Act 406 (1967) 2

Alabama Declaratory Judgment Act, §§ 6-6-220 *et seq.*, Alabama Code (1975) 10, 14

Alabama State Business License Code, §§ 40-12-1, *et seq.* 2

Amendment 328, § 6.08, Alabama Constitution (1901) 35

Canon 5F, Alabama Canons of Judicial Ethics 35

31 CFR § 215.2 ..... 2, 31, 32

Jefferson County, Alabama Ordinance No. 1120 ..... 2, 5, 6, 7, 9, 36

H. Rep. No. 26, 76 Cong., First Sess. (1939) 28

S. Rep. No. 112, 76 Cong., First Sess. (1939) 28

4 U.S.C. §§ 106-110 ..... 1, 11, 29

4 U.S.C. § 111 ..... 1, 11, 27

5 U.S.C. § 5520 ..... 1, 30, 32

28 U.S.C. § 1254 1

28 U.S.C. § 1341 10

28 U.S.C. § 1442(a)(1), (3) 10

Section 34-3-11, Alabama Code (1975) 35

United States Constitution, Article VI 1

CITATIONS OF THE OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The opinions and judgments entered in the courts below are contained in the appendix to the petition.

STATEMENT FOR BASIS OF JURISDICTION

This is an appeal from an en banc decision of the United States Court of Appeals for the Eleventh Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

(i) Date of en banc judgment: March 27, 1998.

(ii) Certiorari granted December 7, 1998.

(iii) Jurisdiction is conferred by 28 U.S.C. § 1254(1) and Rule 10(c) of this Court's rules.

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

The provisions involved are lengthy. Only their citations are provided below. The verbatim text is contained in the appendix to the petition.

i. The supremacy clause, Article VI, United States Constitution. (Appendix to Petition, p. 118)

ii. The Buck Act, 4 U.S.C. §§ 106-110. (Appendix to Petition, pp. 119-120)

iii. The Public Salary Act, 4 U.S.C. § 111. (Appendix to Petition, p. 121)

iv. 5 U.S.C. § 5520. (Appendix to Petition, pp. 122-124)

v. 31 CFR § 215.2. (Appendix to Petition, p. 125)

vi. Alabama Act 406 (1967). (Appendix to Petition, pp. 126-128)

vii. Jefferson County, Alabama Ordinance No. 1120. (Appendix to Petition, pp. 128-139)

viii. The Alabama State Business License Code, §§ 40-12-1, *et seq.*, Alabama Code (1975). (Appendix to Petition, pp. 140-175)

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition.

William Acker and U.W. Clemon are Article III judges in the Northern District of Alabama. They refused to pay the county's occupational tax which was authorized by Alabama Act 406 (1967) [hereafter "Act 406"] and implemented by County Ordinance 1120, effective January 1, 1988. (Act and Ordinance in Appendix to Petition) The occupational tax is levied at the rate of one-half of one percent (.005%) on the gross receipts earned in the geographic boundary of the county by individuals who are not required to purchase a state business license pursuant to the state business license code codified at §§ 40-12-1 *et seq.*, Ala. Code (1975). The occupational tax is collected from hundreds of thousands of persons who work in the county including federal, state and local government employees.

The county filed suit against the judges in the state small claims court. The judges removed the cases to the

United States District Court for the Northern District of Alabama.[1] The cases were consolidated and specially assigned to the Honorable Charles A. Moye, Jr., Senior District Judge, from the State of Georgia. As the case involved only questions of law and since the material facts were undisputed, it was submitted to the trial court on stipulated facts and cross motions for summary judgment. The trial court entered a final order denying the county's motion for summary judgment and granting the judges' motions for summary judgment. The trial court held that, as applied to federal judges, the county occupational tax is a "franchise tax imposed upon the federal judiciary operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." 800 F.Supp. at 1545, 46. The trial court also held that the county occupational tax "constitutes an unconstitutional diminution of the defendants' compensation and is invalid as to them." 805 F.Supp. at 1548. (Trial court opinion in Appendix to Petition, pp. 82-116)

The county appealed. The case was assigned to a three judge panel of the Eleventh Circuit Court of Appeals. After briefing and oral argument the panel reversed the trial court and held the levy of the tax on the judges' compensation did not violate the Supremacy clause or the Compensation clause of the United States Constitution and remanded the case for determination of the amount of tax owed. 61 F.3d 848.

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[1] The county moved to remand the case for lack of jurisdiction on the basis of the Tax Injunction Act. The trial court denied the motion. Motion and order at [R-1-6-1 and R-1-12-1].

The court of appeals granted en banc rehearing. 73 F.3d 1066. After rebriefing and oral argument, the divided[2] court of appeals held that the county tax on federal judges is a direct tax on the federal government in violation of the intergovernmental tax immunity doctrine. 92 F.3d 1561. In affirming the trial court, the court of appeals declined to reach the Compensation clause issue. (First court of appeals opinion in Appendix to Petition, pp. 26-81)

The county filed a petition for certiorari. This Court requested the United States to file an *amicus* brief. The Attorney General and Solicitor General filed an *amicus* brief urging this Court to grant the petition and reverse the court of appeals.[3] The Attorney General and Solicitor General also suggested that this Court examine federal jurisdiction. (Amicus brief in Appendix to Petition, pp. 176-196) This Court granted the petition, vacated the court of appeals decision and remanded the case for consideration of jurisdiction in light of *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997).

After rebriefing and without oral argument, the court of appeals entered a supplemental opinion distinguishing this case from *Arkansas v. Farm Credit* by holding that federal judges more closely resemble Indian tribes and federal reserve banks than production credit associations. The court of appeals held the judges may utilize the

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[2] En banc 9 judges to 3 judges.

[3] The *amicus* brief is reproduced in the appendix to the Petition at 176-196.

judicial exception to the Tax Injunction Act notwithstanding the absence of the United States as a party. Having found federal jurisdiction, the court of appeals reinstated its prior en banc opinion, this time with an additional dissenting judge. (Second court of appeals opinion in Appendix to Petition, pp. 1-25) This appeal followed. This Court granted certiorari on December 7, 1998.

(II) Stipulated Facts

The undisputed material facts were stipulated by the parties before the district court and on appeal as follows:

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay a privilege, license or occupational tax to the State of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the county, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the county not required by state law to pay a privilege, license or occupational tax to the state.

Section 2 of Jefferson County Ordinance No. 1120 provides:

> [i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging

in or following such vocation, occupation, calling or profession . . .

Section 1, Definitions, subsection (C), provides:

[t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The county occupational tax is measured at the rate of one-half of one percent (.005) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintained their principal offices at the Hugo Black Federal Courthouse in the city of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, section 3, provides:

[i]n cases where compensation is earned as a result of work done or services performed both

within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the State of Alabama. Defendants, however, still pay their dues (one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld county occupational tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the county occupational tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting

procedure. At least one Article III judge (not a defendant) has paid "under protest".

12. All State District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the county occupational tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the county occupational tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, had chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the county occupational tax.

14. Since 1970, the city of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the county tax) on persons engaged in any vocation, occupation, calling or profession within the city.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the city occupational tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the county occupational tax, except that it

contains no exemptions. The Gadsden ordinance provides in pertinent part:

> [i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, City Code, Section 7-51.

18. The city of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division of the Northern District of Alabama, which has its courthouse in the city of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

SUMMARY OF THE ARGUMENT

ISSUE I – JURISDICTION

The County acknowledges agreement with *some* of the court of appeals' conclusions about the application of the Tax Injunction Act, 28 U.S.C. § 1341 [hereafter "TIA"] to this case. The court of appeals correctly found at part II, section B of its opinion that the TIA applies to this case; that the Alabama Declaratory Judgment Act, §§ 6-6-220 *et seq.*, Alabama Code (1975), provides the judges with a plain, speedy and efficient remedy to assert their constitutional and other objections to the tax as affirmative defenses in their answer in the state court suit; that the statutory exception to the TIA is therefore unavailable; and, that the federal officer removal statute, 28 U.S.C. § 1442, does not override the TIA.[4] The county believes each of the foregoing conclusions are correct for the reasons set forth in the court of appeals' opinion. We will not waste space or time dwelling on those portions of the lower court opinion which contain no error. Instead, we focus on the court of appeals' erroneous application of the judicial exception to the Tax Injunction Act in this case.

Unless an exception applies, the TIA operates to bar federal jurisdiction over this case. The statutory exception to the TIA is not available because Alabama provides the judges with a plain, speedy and efficient remedy where

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[4] Holding that the federal officer removal statute overrides the TIA would be the logical equivalent of holding that the diversity and federal question statutes also override the TIA thereby leaving it no field of operation.

their constitutional and other objections to the tax may be presented. The judicial exception to the TIA should not be available because the United States is not a co-party as required by *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997) and *Department of Employment v. United States*, 385 U.S. 355 (1966).

There are numerous reasons why the Court should apply the same requirement (i.e., that the United States be a co-party) to federal employees as the Court requires for federal instrumentalities. First, the requirement prevents instrumentalities from evading *Arkansas v. Farm Credit Services* by simply suing in the name of an employee without the United States. Second, it requires federal employees to seek the services of instead of bypassing and ignoring the Attorney General. Third, the requirement maintains the narrow construction of the judicial exception which this Court has insisted upon in earlier decisions. Fourth, it thereby protects the integrity of the TIA. Fifth, requiring the United States to be a co-party prevents federal employees from picking and choosing when they stand in the shoes of the government for purposes of tax avoidance as the judges are trying to do in this case. The county urges the Court to reverse the court of appeals' reckless expansion of the judicial exception and hold that the judicial exception is not available to federal employees who litigate with state taxing authorities unless the United States is a co-party.

ISSUE II – MERITS

The Public Salary Tax Act, 4 U.S.C. § 111 [hereafter "PSTA"] and the Buck Act, 4 U.S.C. §§ 106, *et seq.*, waive

the judges' immunity from the county tax. The tax falls within the PSTA because it does not discriminate against the judges on account of the source of their pay or compensation. The tax also falls within the Buck Act because it is measured by gross receipts. Because Congress has waived the judges' immunity from this tax, Supremacy clause and tax immunity violations are not possible.

ARGUMENT

I. WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION IN LIGHT OF THE TAX INJUNCTION ACT

A. The Tax Injunction Act and its Exceptions

1. The Act

The TIA provides:

> The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

Id.

In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), this Court described the TIA's purpose as "limiting drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 457 U.S. at 408, 409. In *Grace Brethren* this Court also held the TIA prevents a district court "from issuing a declaratory judgment holding state tax laws unconstitutional." 457 U.S. at 408. This Court and the federal courts

of appeal have consistently held that the TIA "eliminated federal jurisdiction over all cases – including tax enforcement actions – in which an inquiry into the validity of a state or local tax is necessary to afford one of the parties a complete defense." *See Keleher v. New England Telephone and Telegraph Company*, 947 F.2d 547 (2nd Cir. 1991); *Hardwick v. Cuomo*, 891 F.2d 1097 (3rd Cir. 1989); *City of Burbank v. State of Nevada*, 658 F.2d 708 (9th Cir. 1981). Since an inquiry into the validity of the county tax is necessary to afford the judges a defense, and since that defense resulted in the trial court's declaratory judgment that the county tax, as applied to judges, violated the Supremacy clause, it follows that the TIA was triggered and barred federal jurisdiction unless an exception applied.[5]

2. The Exceptions

There are two exceptions to the TIA:

(a) The statutory exception, and

(b) The judicial exception.

(a) Statutory Exception

The statute permits federal jurisdiction only where there is no plain, speedy and efficient state court remedy. In *Grace Brethren*, this Court held that the statutory exception must be construed narrowly. 457 U.S. at 413. The test is whether Alabama provides the defendant judges with

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[5] That is why the county moved to remand the case to state court at the outset. But, the trial court denied the motion. *See* Motion to Remand and Order at [R-1-6-1 and R-1-12-1].

some opportunity to raise their constitutional objections. *Rosewell v. Lasalle National Bank*, 450 U.S. 503 (1980).

At Part II, Section B(1), page 1949 of its opinion, the court of appeals correctly found that Alabama provides the judges with a plain, speedy and efficient remedy. The Alabama Declaratory Judgment Act, §§ 6-6-220, *et seq.*, Alabama Code (1975), permits the judges to assert their constitutional and other objections to the tax as affirmative defenses in their answer in the state court suit and to litigate those issues in the state court proceeding. The court of appeals correctly noted that the judges have never contested the sufficiency of the Alabama remedy. The court of appeals also noted that it had previously held that the Alabama declaratory judgment act provided a plain, speedy and efficient remedy to challenge the very tax at issue in this case. *See Richards v. Jefferson County*, 983 F.2d 237 (11th Cir. 1992) (dismissing a constitutional challenge to the county tax for lack of federal jurisdiction pursuant to the TIA).[6] Since Alabama provides the judges

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[6] A Westlaw query revealed 225 reported decisions of the Alabama appellate courts where the Alabama Declaratory Judgment Act was utilized by taxpayers to challenge the constitutionality of various state taxes. Some of those cases are as follows: *Thompson v. Chilton County*, 236 Ala. 142, 181 So. 701 (1938) (a taxpayer may sue under the Declaratory Judgment Act to prevent unconstitutional use of funds by County); *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) (declaration that the Jefferson County occupational tax is constitutional); *Sizemore v. Rinehart*, 611 So.2d 1064 (Ala. Civ. App. 1992) (declaration that state income tax on retirement benefits received by military retirees while, at the same time exempting benefits received by state retirees, violated the Public Salary Tax Act and the United States Constitution; twenty million dollar

with a plain, speedy and efficient remedy, it is axiomatic that the statutory exception to the Act is not available.

(b) Judicial Exception

The judicial exception was established by this Court in *Department of Employment v. United States*, 385 U.S. 355 (1966), holding that "the TIA does not act as a restriction upon suits *by the United States* to protect itself and its instrumentalities from unconstitutional state exactions." 385 U.S. at 358. After *Department of Employment* was released, the courts of appeal split over whether federal instrumentalities could contest state taxes in federal court without the government as a co-party. This Court resolved that split in *Arkansas v. Farm Credit Services*, 520 U.S. 801 (1997) by holding that the judicial exception was available to an instrumentality such as a production credit association (PCA) only if the United States government was an actual party in the suit.

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retroactive refund of state income tax to federal retirees ordered); *Concerned Citizens of Fairfield v. City of Fairfield*, 718 So.2d 1140 (Ala. Civ. App. 1998) (declaratory judgment that municipal garbage collection fee was unconstitutional); *Melof v. James*, 1998 WL 227965 (Ala. Civ. App. May 8, 1998) (declaratory in taxpayer class action that the state's classification of retirement benefits for state income tax purposes did not violate the federal equal protection clause); *Howell Lumber Company v. City of Tuscaloosa*, 1997 WL 139499 (Ala. Civ. App.) (declaratory judgment that levy of municipal business license tax on business outside corporate limits was constitutional).

B. This Case

This case presents the question of whether the U.S. government must also be a co-party with a federal employee who seeks to invoke the judicial exception to the TIA. That is, does the bright line test established in *Arkansas v. Farm Credit* also apply to federal employees.[7] We believe that question must be answered in the affirmative for a number of reasons.

First, instead of applying the test of *Arkansas v. Farm Credit Services* and holding that because the United States is not a co-party the judicial exception is not available, the court of appeals came up with a new test. That new test treats the employee as an instrumentality and then compares the employee to the PCA in *Arkansas v. Farm Credit Services* and the Indian tribe in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (holding that a special jurisdictional statute gives Native American tribes special access to the federal courts embodying a congressional purpose to let tribes sue in federal court as though they were the United States) and the federal reserve bank in *Federal Reserve Bank v. Commissioner of Corps and Taxation*, 499 F.2d 60 (1st Cir. 1974) (also holding that a special jurisdictional statute embodies a congressional purpose to allow the federal reserve to sue in federal court as though it were the United States) to determine whether the employee is closer to a PCA, an Indian tribe or a

[7] When receiving income for services rendered the United States judges Acker and Clemon are no different from any other federal employee. As such, their salaries are subject to a number of employment taxes including the federal income tax, FICA, state income tax, etc.

federal reserve bank. That tortured analysis results in the court of appeals finding that a federal employee is closer to an Indian tribe and a federal reserve bank than a production credit association (PCA). Of course, the transparent purpose of that exercise is to evade *Arkansas v. Farm Credit Services* by merely allowing the employee to sue in place of the instrumentality. The only way to stop such gamesmanship is to require that, for the judicial exception to apply, the United States itself must be a party along with the employee. If for example the United States sues in federal court on behalf of the Internal Revenue Service to have a state tax lien voided, it is clear that the judicial exception ought to apply and federal jurisdiction should exist. It is also clear that if John Doe, an employee of the IRS, sues in federal court to escape a state tax on his pay or compensation without the United States as a co-party, the judicial exception ought not apply. Likewise, if the United States sues in federal court on behalf of the judicial department to enjoin the levy of state property tax on a federal courthouse, it is clear that the judicial exception ought to apply and federal jurisdiction ought to exist. But, if an employee who works in that courthouse sues in federal court to escape payment of a state or local tax on pay or compensation without the United States as a co-party, it is clear that the judicial exception should not apply. A bright line test requiring the presence of the United States as a co-party maintains the scope of the judicial exception to suits involving only the United States itself. Such a bright line requirement also prevents the lower courts from blurring the distinctions between the United States and its employees with regard to the levy of state and local taxes. The PCA in the

Arkansas v. Farm Credit Service case was not the United States. Likewise, Judges Acker and Clemon are not the United States; they are employees of the United States when they receive income for services rendered to their employer. There are obvious distinctions between the United States and its employees with regard to state taxation. As fully discussed at issue II below *this Court and Congress created those distinctions*. As example, Congress created a distinction between the United States and its employees by consenting to the state and local taxation of the employees' pay or compensation. Since 1938 this Court has distinguished between the United States and its employees in the application of the doctrine of intergovernmental tax immunity. *Davis v. Michigan Dep't of Treasury* and *United States v. New Mexico* and *Graves v. New York* all hold that the doctrine immunizes only the United States and not its employees. There is no reason to depart from those distinctions in this case by now holding that there is no distinction between a federal employee and the United States with regard to liability for state and local taxes. The fact that these employees are also judges is interesting but adds nothing to the analysis.

Second, the court of appeals' opinion encourages federal employees to bypass and ignore the Attorney General. This case illustrates the illogical result of that behavior. The judges are permitted to litigate, speak for and stand in the shoes of the United States while, at the same time, *advancing a position in direct conflict with that expressed by the United States*. This has several undesirable consequences. It neuters the function of the Attorney General. It allows the United States to speak with multiple voices which makes it difficult if not impossible for a

Court to determine the United States' true position. And, it allows federal employees and agencies to "shoot at" each other in a federal courtroom. All of those consequences are avoided by requiring the United States as a party if the judicial exception is to be available to a federal employee.

Third, by blurring the distinction between the United States and its employees and by allowing the employees to litigate in federal court without the United States, the judicial exception is enormously expanded. That would amount to a reversal of course on every prior decision of this Court pertaining to the levy of state or local tax on the pay or compensation of a federal employee. In *Arkansas v. Farm Credit Services*, the Court cautioned lower courts to limit rather than expand the judicial exception to the TIA stating: "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." 117 S.Ct. at 1780. In *Grace Brethren* the Court stated: "exceptions from the TIA must be construed narrowly" 457 U.S. at 413. It is reckless and unnecessary to reverse course and expand the judicial exception to a point that it defeats the purpose of TIA. That would be the result if the Court concluded that federal employees could litigate with state taxing authorities without the United States. The TIA would be meaningless.

Fourth, of the universe of potential plaintiffs, those who can claim an employment connection with the federal government have historically had the best chance of evading a state or local tax. It is significant that at the time the TIA was enacted in 1937 the doctrine of intergovernmental tax immunity was at its zenith. In 1937 *the*

persons most likely to litigate with a state taxing authority were those with some employment connection to the federal government. Many of this Court's reported decisions on the subject involve an employee trying to avoid a state or local tax by claiming that he or she stood in the shoes of the United States and that the tax interfered with or burdened the federal government (i.e., trying to blur the distinction between the employee and the United States as is being attempted in this case). It is reasonable and likely that those are the very persons Congress intended to reach with the TIA. That is, Congress intended to stop them from using the federal courts to evade state taxation of their pay *unless the United States would join them as a party.* Allowing them to litigate without the United States defeats that central purpose of the TIA.

Fifth, allowing federal employees to litigate with state taxing authorities without the United States as a co-party allows them to pick and choose when they stand in the shoes of the government for purposes of tax avoidance. This case illustrates how that game is played. Both judges admitted in their interrogatory answers that they, as federal judges, are subject to the Alabama state income tax.[8] That means they are distinguishable from the United States for state income tax purposes. If they are distinguishable for state income tax purposes it follows they

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[8] Interrogatory 12 – Do you agree that federal judges of the Northern District of Alabama who work and reside in the state of Alabama are subject to the Alabama income tax?

Response – Yes. (See answers to interrogatories collectively assembled by district court clerk at R1-18)

are distinguishable for local tax purposes. Conversely, if the judges really are the United States it follows they are not subject to *any* tax. By admitting liability for *some* state taxes the judges reveal what they are really doing. They are picking and choosing when they stand in the shoes of the United States for purposes of tax avoidance. That is illustrated by Judge Clemon's behavior. He refuses to pay the county tax but it is undisputed that, since he was appointed a federal judge, he has paid without question an identical occupational tax to the city of Birmingham *at twice the rate of the county tax!* [R-1-34-37]. This Court should not interpret the judicial exception to the TIA in a manner that allows a federal employee to pick and choose which taxes he or she will pay.

The Court should reverse the court of appeals and hold that the judicial exception is available to a federal employee *only* when the United States itself is a co-party. This case should be remanded to state court for lack of federal jurisdiction.

II. WHETHER A COUNTY PRIVILEGE/OCCUPATIONAL TAX LEVIED ON THE PAY OR COMPENSATION OF AN ARTICLE III JUDGE VIOLATES THE SUPREMACY CLAUSE.

A. Origin and Rise of Doctrine of Intergovernmental Tax Immunity

The doctrine of federal immunity from state taxation originated in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), where this Court invalidated a state tax on the Bank of the United States. From 1819 until the 1930's the doctrine was expanded by the federal courts. At its zenith

in 1937 the doctrine immunized all federal officers, employees, and contractors from state and local taxation. The doctrine was a two way street which also immunized all state and local employees and officials from federal taxation. *See Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 435 (1842); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

B. Fall of the Doctrine

In the 1930's this Court and Congress began to dismantle the doctrine.

1. Judicial Dismantling

In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), this Court declined to follow the *Dobbins/Day* line of cases and implicitly overruled *Collector v. Day* by holding that state employees of the New York Port Authority were subject to the federal income tax. One year later, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), this Court expressly overruled the entire line of cases from *Dobbins* to *Day*. An insightful explanation of this Court's rationale for dismantling the doctrine is found in the special concurrence of Justice Frankfurter in *Graves v. New York*:

> The arguments upon which *McCulloch v. Maryland* rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency

> to the phrase that 'the power to tax is the power to destroy.' This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch v. Maryland*. The seductive cliché that the power to tax is the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely, the doctrine that their immunities are correlative – because the existence of the national government implies immunities from state taxation, the existence of the state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time:
>
> > I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of state governments as it has of taxing its own officers. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult to control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a

> fallacy and that it will lead to mischievous consequences.
>
> All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions'.

In a series of cases from 1938 to present this Court further dismantled the doctrine and restored federal officers, employees and contractors to state and local tax rolls. *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982) (federal contractors required to pay New Mexico gross receipts tax for privilege of doing business with federal government in the state); *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977) (employees of US Forest service required to pay California property tax on homes located on federal land and provided to employee as part of compensation); *Howard v. Commissioners*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953) (civilian employees of Navy working on military base required to pay municipal occupational tax to city of Louisville); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed.2d 3 (1941) (federal contractors required to pay Alabama sales tax on sales to federal government); *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed.2d 927 (1939) (employees of federal instrumentality required to pay New York state income tax); *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed.2d 155 (1937) (federal contractor required to pay West Virginia gross receipts tax for privilege of doing business with federal government in the state).

In each of the foregoing cases the federal officers, employees or contractors unsuccessfully advanced the

same arguments made by the judges in this case (i.e., that they stand in the shoes of the United States and the tax interfered with or burdened their federal functions and duties). In each case this Court rejected that argument. In *Graves v. New York* this Court observed:

> The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable.

306 U.S. at 480.

Though Justice Stone was discussing the New York tax levied on the privilege of working in that state, he may just as well have been describing the county's occupational tax. The county tax is measured by income. It is imposed in a non-discriminatory manner upon the salaries of all judges, state and federal,[9] as well as hundreds

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[9] It is undisputed that the tax is levied on all state and federal judges and is paid by all 27 state judges within Jefferson County, Alabama and by three Alabama Supreme Court Justices who have satellite offices in the county. (R1-34-36) Further, it is undisputed that all of the federal judges in the Northern District

of thousands of other federal, state, municipal and private sector wage earners in the county. The tax is not levied in form or substance on the United States. It is not paid with government funds. It is paid by the judges with monies they receive as compensation for their services.

In *United States v. New Mexico*, this Court held that the doctrine is not violated even where the entire economic burden is shouldered by the federal government:

> . . . [T]ax immunity is appropriate in ***only one circumstance***: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot be realistically viewed as separate entities. . . .

455 U.S. at 735.

> . . . [I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire burden of the levy.
>
> • • •
>
> Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the government. And where a use tax is involved, immunity cannot be conferred simply because the

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of Alabama (except Defendants) have paid the county tax. Moreover, it is undisputed that all of the federal judges in the Northern District of Alabama (except Acker) including Defendant Clemon have paid an identical occupational tax to the city of Birmingham without question since their respective appointments to the bench. The city tax is twice the rate of the county tax! (R1-34-37)

> state is levying the tax on the use of federal property in private hands. . . . Indeed, immunity cannot be conferred simply because the tax is paid with government funds.

455 U.S. at 734, 35.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court described the modern status of the doctrine as follows:

> After *Graves v. New York*, intergovernmental tax immunity barred only those taxes that were imposed *directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt*. [Emphasis added]

489 U.S. at 811.

2. Congressional Dismantling

The Public Salary Tax Act and the Buck Act waive and extinguish whatever tax immunity federal officers and employees formerly enjoyed.

a. The Public Salary Act (hereinafter "PSTA")

The PSTA, 4 U.S.C. § 111 provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of

> one or more of the foregoing, by a duly constituted taxing authority, having jurisdiction, *if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.* [emphasis added]

Id.

The PSTA was debated and enacted by Congress in 1937 just before this Court began the process of narrowing, and ultimately abandoning, the *Dobbins/Day* line of cases. By enacting the PSTA Congress expressly consented to the non-discriminatory state taxation of the pay or compensation of federal officers and employees. *See* H. Rep. No. 26, 76 Cong., First Sess. (1939); S. Rep. No. 112, 76 Cong., First Sess. (1939). Just before the PSTA was signed into law this Court released *Graves v. New York*, so the practical effect of the PSTA was to codify the intervening result in *Graves* and, as this Court described in *Davis v. Michigan Dept. of Treasury*, to "thereby foreclose the possibility that subsequent judicial reconsideration of [Graves] might re-establish the broader interpretation of the immunity doctrine." 489 U.S. at 812. Clearly, the purpose of the PSTA is to *abandon*, not preserve or extend, the immunity of federal officers and employees from non-discriminatory state taxation. That conclusion was succinctly stated by this Court in *Davis v. Michigan Dept. of Treasury* as follows:

> . . . [t]he overall meaning of section 111 [the PSTA] is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits and other forms of compensation paid on account of their employment with the federal government, *except to the extent that such taxation discriminates on account of the source of the compensation.* [emphasis added]

489 U.S. at 810.

b. The Buck Act

The Buck Act, 4 U.S.C. § 106(a) provides:

> No person shall be relieved from liability for any *income tax*[10] levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area, or receiving income from transactions occurring or services performed in such area, or receiving *income from transactions occurring or services performed in such area*; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax within federal area within such state to the same extent and with the same extent as though such area was not a federal area.

Id.

Examination of the Senate Report on the Buck Act definition of the term "income tax" reveals that Congress deliberately chose a broad definition to include local privilege license taxes and occupational taxes. Moreover, the Senate Report confirms that Congress specifically intended that a local tax be treated as an "income tax" for

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[10] The term "income tax" is defined at 4 U.S.C. § 110(c) as:

> The term "income tax" means any tax levied on, with respect to or measured by, net income, gross income or gross receipts.

purposes of the Buck Act despite being denominated as a privilege license tax under state law:

> [t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax (whether known as a corporate-franchise tax, or *business privilege tax, or any other name*) if it is levied on, with respect to or *measured* by net income, gross income or *gross receipts*.
>
> * * *
>
> The Buck Act "income tax" broadly defined as it is, refers to the broad, generic class of taxes upon income. *It does not require that the tax be denominated an income tax or that it conform to the federal income tax.* If the tax in question is based upon income and is *measured by* that income in money or monies worth, if a net income tax, gross income tax or *gross receipts* tax, *it is an "income tax"*.

Report of Senate Finance Committee, as quoted in *Humble Oil and Refining Company v. Calvert*, 478 S.W.2d 926, *cert. denied*, 93 S.Ct. 293, 409 U.S. 967, 34 L.Ed.2d 234 (1972).

c. 5 U.S.C. § 5520

5 U.S.C. § 5520 requires the secretary of the treasury to withhold local taxes from federal employees, as follows:

> (a) When a county or city ordinance –
>
> (1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sum to a designated city or county officer, department or instrumentality and
>
> (2) imposes the duty of withholding generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction.

The secretary of the treasury, under regulations prescribed by the President,[11] shall enter into an

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[11] By executive order at 31 C.F.R. § 215.2, the President has directed that *all elements of the judicial branch* are subject to withholding of city and County license or privilege taxes:

> (a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. § 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only *all elements of the judicial branch*.
>
> * * *
>
> (f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance
>
> (1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;

agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the *agency* who is subject to the tax and (i) whose regular place of federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county.

* * *

(c) For the purpose of this section

(4) "Agency" means –

(a) An executive agency;

(b) The *judicial branch*; and

(c) The United States Postal Service.

Id.

Nothing in 5 U.S.C. § 5520 or 31 CFR § 215.2 exempts federal judges from the withholding requirements contained therein. On the contrary, the language is unambiguous and the term "judicial branch" is obviously inclusive and not exclusive.

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(2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. *Whether the tax is described as an income tax, wage, payroll, earnings, **occupational** license or otherwise is immaterial.*

31 CFR § 215.2

C. THE CORRECT TESTS THE COURT OF APPEALS SHOULD HAVE APPLIED

1. The correct test to determine whether a state tax falls within the consent of the PSTA is found in the statute itself. Does the county tax discriminate against the judges because of the source of their pay or compensation?

2. The correct test to determine whether a state tax falls within the consent of the Buck Act is whether it is an "income tax" as defined in the Act (i.e., under *federal*, not state law). Is the county tax levied on, with respect to or measured by, net income, gross income or gross receipts?

3. The correct test to determine whether the county tax violates the modern doctrine of intergovernmental tax immunity is whether it is levied directly on the United States itself. *Davis v. Michigan Dept. of Treasury*.

D. APPLICATION OF THE CORRECT TESTS TO THE UNDISPUTED EVIDENCE IN THIS CASE

1. The PSTA:

QUESTION: DOES THE TAX DISCRIMINATE AGAINST THE JUDGES BECAUSE OF THE SOURCE OF THEIR PAY OR COMPENSATION?

ANSWER: NO.

The judges have presented no evidence that the tax discriminates against them on account of the source of their pay. Instead, the evidence is undisputed that the tax is paid by all 27 state court judges located in the county

and by the three Alabama Supreme Court Justices who have satellite offices in the county. [R1-34-36] It is undisputed that all of the federal judges in the Northern District of Alabama (except Acker and Clemon) have paid the county tax. It is also undisputed that all of the federal judges in the Northern District of Alabama (except Defendant Acker), including Defendant Clemon, have paid an identical occupational tax to the city of Birmingham without question since their respective appointments to the bench, and the city tax is twice the rate of the county tax. [R1-34-37] The evidence is undisputed that the tax is imposed in a non-discriminatory manner upon the salaries of all judges, state and federal, as well as hundreds of thousands of others who earn wages in the county.

In their panel and en banc briefs to the court of appeals the judges made an argument of wrongful discrimination comparing federal judges with lawyers for a discriminatory treatment analysis instead of comparing federal judges with state judges. Federal judges cannot be compared with lawyers because federal judges are prohibited from practicing law. Title 28, Section 454, United States Code, makes it a crime for a federal judge to "engage in the practice of law":

> ***Practice of law by justices and judges.***
>
> Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

For discriminatory treatment analysis federal judges should be compared with state judges. For purposes of the PSTA state and federal judges are identically situated. They are treated in an identical manner under the county

tax. That satisfies the only test in the PSTA. Exempting federal judges from a tax the state judges are required to pay is the reverse of discrimination: it is favoritism.[12]

2. The Buck Act:

QUESTION: IS THE COUNTY TAX LEVIED ON, WITH RESPECT TO OR MEASURED BY, NET INCOME, GROSS INCOME OR GROSS RECEIPTS?

ANSWER: YES.

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[12] The judges' argument also ignored the fact that Alabama state court judges are forbidden from the practice of law by the state constitution and the state code and the Alabama Canons of Judicial Ethics. Amendment 328, § 6.08, Alabama Constitution (1901), provides:

> **Prohibited Activities.**
>
> (a) No judge of any court of this state shall, during his continuance in office, engage in the practice of law or receive any renumeration for his judicial service except the salary and allowances authorized by law.

Section 34-3-11, Alabama Code (1975) provides:

> **Judges Not to Practice Law.**
>
> Any judge of a court of record in this state who practices law in any of the courts of this state, or of the United States, or who renders any professional services or gives any legal advice, must on conviction, be fined in such sum as the jury or court trying the same may assess, not less than $100, no more than $1,000.

Canon 5F, Alabama Canons of Judicial Ethics provides:

> **Practice of Law.**
>
> A judge should not practice law.

It is undisputed that the county occupational tax is levied with respect to and measured by gross receipts. Section 2, Ordinance 1120 provides:

> . . . which license fees shall be measured by one-half percent (1/2%) of the *gross receipts* of each such person.

Appendix to Petition, p. 132.

Section 1, Ordinance 1120 (the definitional section) provides:

> (F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received. But the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

Appendix to Petition, p. 131.

Although the county tax is clearly within the Buck Act definition of the term "income tax", the trial court

and court of appeals relied on the county's label of the tax as a privilege license tax. That ignored the test established by this Court in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953) where the Court examined a municipal tax indistinguishable from the county tax in this case. The issue in *Howard* was the same as this case; whether the municipal tax violated the doctrine of intergovernmental tax immunity or fell within the consent of the Buck Act or PSTA. This Court held that the answer turned on whether the tax was an income tax under *federal* law. This Court applied the *federal* definition of the term "income tax" contained in the Buck Act and held that the Louisville tax was measured by gross receipts, therefore, it was an income tax for purposes of the Buck Act even though denominated a privilege license tax under Kentucky law. This Court held that it makes no difference how the tax is denominated under state law:

> [t]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act. . . . We hold the tax authorized by this ordinance was an income tax within the meaning of *federal* law.

344 U.S. at 628-9.

In the instant case the court of appeals ignored *Howard* by looking to the County's label on the tax as a privilege license tax instead of looking to the Buck definition of the term "income tax". The court of appeals' refusal to follow *Howard* is illustrated by the following sentence from its opinion:

> . . . if the state court's denomination is a reasonable interpretation of the ordinance, we deem it conclusive.

92 F.3d at 1570.

The county tax is clearly within the *federal* definition of the term "income tax" in the Buck Act. It is therefore axiomatic that the county tax falls within the consent of the Buck Act.

3. Intergovernmental Tax Immunity:

QUESTION: IS THE COUNTY TAX LEVIED DIRECTLY ON THE UNITED STATES ITSELF?

ANSWER: NO.

The evidence in this case is undisputed and the trial court and the court of appeals expressly found that the County tax imposes no economic burden on the United States. At 850 F.Supp. 1544 the trial court found: "The Jefferson County tax, of course, would be paid by individual federal judges, the defendants, out of their own pockets *without imposing any monetary (economic) burden upon the Federal Government itself.*" And, the court of appeals stated:

> We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in

> *O'Keefe. We hold that the legal incidence of the tax falls on the federal judge.*

92 F.3d at 1571-72.

Despite finding that the economic burden and legal incidence of the tax were *not* on the United States, the trial court and court of appeals held the tax violated the tax immunity doctrine. That ignores the test established by this Court in *Davis v. Michigan Dept. of Treasury, United States v. New Mexico* and *Graves v. New York* which all hold that the doctrine is violated only where the tax is levied directly on the United States itself. Judges Acker and Clemon are not the United States. They are *employees* of the United States. When receiving income for services rendered they are no different than any other federal employee. As such, their salaries are subject to a number of taxes including federal income tax, FICA tax, state income tax and the city and county tax. Because the county tax is not levied upon the United States government it is axiomatic that there is no violation of the tax immunity doctrine. *Davis v. Michigan Dept. of Treasury, United States v. New Mexico.*

CONCLUSION

The court of appeals erred by holding: (1) that federal jurisdiction exists over this case; (2) that Congress did not consent to the levy of the tax on the judges' pay or compensation; and (3) that the tax violates the Supremacy clause and related doctrine of intergovernmental tax immunity.

With regard to jurisdiction, the County urges the Court to apply the same bright line test from *Arkansas v. Farm Credit Services* to federal employees who seek to litigate with state taxing authorities in federal court. The United States should be required to be a co-party if the judicial exception is to be available to a federal employee.

With regard to Congressional consent, when the undisputed evidence is analyzed under the correct tests it is axiomatic that the county tax is an "income tax" under the federal definition of that term in the Buck Act. That satisfies the only requirement in the Buck Act. It is also axiomatic that the county tax does not discriminate against federal employees on account of the source of their pay or compensation. That satisfies the only requirement in the PSTA. It follows that Congress consented to the levy of this tax on these judges thereby waiving whatever immunity might otherwise exist.

With regard to the Supremacy clause and related doctrine of tax immunity, the undisputed evidence proves that the tax is not levied in form or substance on the United States. It follows that there is no violation of the doctrine of tax immunity or the Supremacy clause.

The County urges the Court to reverse the trial court and court of appeals and remand the case to state court for lack of federal jurisdiction. However, if the Court determines that federal jurisdiction exists, the county requests the Court to reverse the trial court and court of appeals and rule in the county's favor on the Supremacy clause issue. The Court is reminded that the trial court held that the tax also violates the Compensation clause but the court of appeals declined to reach that question.

Therefore, the county urges the Court to also rule in the county's favor on the Compensation clause issue or to remand the case to the court of appeals with instructions to consider the Compensation clause issue.

Respectfully submitted,

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